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LAW REFORM — PRACTICE.

A MOVEMENT towards a radical change in the practice of law courts in a neighboring state, has recently startled the Bar of New England. The powerful hand of *Progress* has been seen prying under the pedestal of the most time-honored institutions of law. Edifices, built with the granite of Littleton, the cement of Coke, the trowel of Blackstone, the masonic genius of a hundred chief justiciaries, have been set swaying as if they were fresh and flexible, instead of being covered with the moss of many generations. The doctrine of perfectibility, gradually elaborated out of change, — the most omnipotent doctrine of modern times, — has at last penetrated a sphere which has been held almost sacred, hitherto, against the novelties of advancement, and is working like a resistless leaven throughout the system. The venerable seer of jurisprudence lifts his antiquated spectacles, and beholds a maze of surprises which would have confounded Jefferies, and bewildered Romilly. Fragments of demurrers, pieces of trespass *vi et armis*, scattered bills of exceptions to the admission of incompetent witnesses, volatile "combining and confederating" clauses in chancery, vanishing "colloquiums" and "inducements," "innuendoes" and "absque hoc," useless "then-and-theres" and "in-con-

sideration-thereofs," rejected fines *pro pulchro placitando*, and a litter of superfluous seals, solemn certificates, and sacred silliness, — fill his atmosphere and give him a legal ague. He shudders to see the gray hairs of the worshipful head of the law rapidly dropping off, and her children trampling them under their feet.

Nevertheless, the time seems to us to have come, when progress ought to venture within the precincts of bench and bar. We conclude *à priori*, that as the increasing and concentrated light of civilization illuminates the various departments of legal practice, many ancient styles of attaining equity, sometimes perverted to deception and fraud, often to injustice, should be essentially modified, or altogether removed. It is not dignified to predicate that we have already arrived at perfection in this respect. Civil transitions are as frequent as the periods of our planetary revolutions. The principles of government are shifting; and governments themselves are passing from the embryo state to that of expanded and balanced power. Constitutions are removed from their place to admit novel institutions. Solemn laws are enacted at one session, and repealed at another. These facts furnish evidence that the character and wants of the people are changing; and upon this character and these wants the modes of the law, as well as the law itself, are dependent. Some years since, in obedience to this necessity, Massachusetts ordered that the rules of special pleading, hoary with antiquity, should no longer manacle the equities of judicial proceedings, and lay upon the necks of innocent clients the penalties for the faults of an uneducated attorney. In obedience to the same necessity they have suspended the rule of incompetency for interest from witnesses who may be members of political corporations, and of incorporated mutual fire and marine insurance companies, parties to the suit. Yet, not one element of logic is found to distinguish in principle between incorporated mutual companies, and incorporated stock companies. And we may add, nor between them and copartnerships, and these last and individual parties. The only consistent rule, at the same time consistent and absurd, was that of the old common law, of absolute exclusion for the least interest in the event of the suit. Our courts have partially coöperated with the legislature in meeting this public necessity, in respect to pleadings,

by prohibiting the absurd clause in equity pleadings respecting combinations and confederation, and by allowing great latitude of claim and proof under the money counts. The surprised advocate, disappointed in the precise aspect of his evidence, often has occasion to fall back upon this liberality, for the double purpose of saving a needless bill of costs, and to preserve the ermine of justice from otherwise deserved reproach. But in actions of tort, this resource often fails him. He there learns, too late, that some defect exists in his mode of declaring the cause of action, and upon exceptions a hard-earned and expensive verdict (notwithstanding R. S. ch. 100, §§ 21–24) is set aside, disgusting the popular mind by what seems to it the preservation of legal fictions at the sacrifice of legal rights. Thus not only is justice in a particular instance defeated, but the popular opinion of courts of justice, a most important element in the citizen's morals, is degraded. The writer remembers to have heard our present learned chief justice relate, upon the circuit, that after a hard-fought contest, in which Mr. Bryant, the poet, had won a verdict of considerable consequence, in Berkshire, in a suit for slander,[1] exception was taken for a defect in respect to a colloquium. The supreme court, upon argument, were, by strict rule of law, reluctantly obliged to set aside the verdict, though convinced of the equity of the existing posture of the case. Mr. Bryant was so chagrined by the decision, that he at once quitted the practice, and abandoned a profesional life so beset, as it seemed to him, with piratical perils. Though the world may have thereby gained many a noble poem, the bar lost an honest man. Statutes of *jeofails* have accomplished something, and aimed at more, to remedy the evil so constantly experienced; but they have done little else than confessed the existence of the wrong. They have by no means struck at the root of the injury. This is to be reached by another mode. The changes which have been made have been effected reluctantly, and in obedience to the long-resisted and imperative wants of business and society. Some rules remain to be modified, and many to be altogether abolished, in compliance with the changing necessities of the community and of affairs. If the motion be not made by barristers, who will

[1] *Bloss* v. *Toby*, 2 Pick. R. 321.

give to it a tone of permanence, and intellectual strength, it will be made from without, and attended with results which we should most solicitously avoid. The opinion has evidently been gaining ground in these United States, that with all the improvements which have been made, we have still too closely adhered to the nature of our ancestral modes of justice. Searching inquisition into the present condition of practice has been instituted in several parts of the Confederacy, and in New York has almost ripened into its legitimate fruits. Inquiry is now active in Massachusetts. A distinguished member of our bar has successfully urged, in the legislature, the appointment of a commission, which, it is hoped, will contemplate a thorough, *codal* reform of our now merely *prædial* practice. The question now presented more especially to those skilled in jurisprudence is, whether the change shall only be another partial modification, or whether it shall be radical, and to a great degree obviate the necessity of future, material alterations.

Our practice had its origin in a condition of civilization and of society which no longer exists. Formerly, not the laws themselves so much as the construction given to them, afforded protection to the life and liberty of the subject. The necessity of guarding personal safety and property in this way, gave rise to numerous forms and technical requirements to prevent misconstruction of law in favor of the king or a royal partisan, while they were often perverted to an opposite purpose. A still more comprehensive reason for their existence may be found in the intellectual nature of the age, in a learning not confident of itself, and jealous of disclosure, and in the historical fact that all uneducated and unthinking people repose great faith in exact formalities, and regard the law as operating by a sort of miraculous witchcraft. A defendant, caught in the maze of a constructive wrong, artistically set forth in a cloud of innuendoes, videlicets, combinations, and charges, believed as the spirit in *Comus:* —

> "Without the rod reversed,
> And backward mutters of dissevering power,
> We cannot free the lady that sits here,
> In stony fetters fixed, and motionless:" —

and thus, besides his elaborate plea, he appended his "backward mutter" of an *absque hoc*. A broad and liberal equity

was a thing unknown. What with imparlances, dilatory pleas, and appeals, the suitor who won his case must win it "by the hardest," and "at the longest." The "law's delay" became a proverb, and an evil of so great magnitude as to be classed with the first rank of wrongs enumerated in Magna Charta: "Nulli vendemus, nulli negabimus, aut *differemus* justitiam vel rectum." The court of equity, as it grew into existence, was a proof and permanent memorial that courts of law, instead of being, according to their sole design, channels for the administration of justice to all citizens, were obstinately disposed to insist upon their technical rules to the exclusion of right, and bid the suitor go elsewhere to find his remedy; — a destiny even then so melancholy as to be commanded by Lord Kenyon with the well known words *abi in malam rem.*

The two great elements to be especially sought in reforming this practice are simplicity and accuracy. The first has in former times been lost in the elaborated vanity of the pursuit of the last. A reasonable certainty, easily understood by minds of ordinary intelligence, has been abandoned to secure an absolute logical, but to the general mind, incomprehensible, certainty. Proof of this is suggested by a reference to bills in equity, declarations for actionable words, and actions of tort generally. Pleas and issues to the jury have been subject consequently to so much obscurity, that special instructions, and in most instances a re-draft of verdicts, have been requisite to secure a compliance with the rules of law. Juries have found great difficulty in applying evidence to the real points at issue between the litigant parties. They arbitrate upon a state of facts which are half fictitious and half true, and it is not easy for the undisciplined mind rightly to discriminate between the true and the false in their legal effect. So artificially are these set forth in the pleadings, that there is reason to believe, were the truth known, the interests of suitors have often been unintentionally, but nevertheless unjustly, sacrificed by reason of the obscurity covering the real claims and defences as set forth to the twelve judges. The opening to the jury by the respective counsel was intended to meet this danger; but it is itself often obscure, usually loose, and always imperfectly recollected.

Our system is, at this moment, further needlessly burdened with two grand, practical distinctions, resting upon two kinds

of contracts, widely and unnecessarily dissevered in all their details and consequences by means of a wafer. Numerous volumes hardly contain the exhaustless varieties of statement, and forms of pleading under these divisions, and actions of trespass and case. These are often distinguished by such hair-like differences, that the attorney trembles while he drafts.

They are attended with numberless and annoying technicalities which are raised every day, and overruled by the intelligence of the courts, only to find a new resurrection at the next term, and meet with a new perdition. It is well known that the reason for the use of the seal, the handwriting of ignorance, no longer exists. This fact has been acknowledged by Pennsylvania, and other states, where a scrawl of the pen is permitted to represent it, and offends good taste at the same time that it confesses the silly formality. Massachusetts has dispensed with its use in the case of wills,[1] and relaxed the rule in other instances.[2] This dispensation is clearly arbitrary, the reasons extending much further than the provisions hitherto made. It would be a work of supererogation to cite instances of fatal distinctions which would fall under the category of formal, in our present system of practice. We take it for granted that every lawyer in any considerable practice has, to a degree, ascertained their extent, and deprecated what he deems restrictions upon the attainment of justice. It will be agreed that every thing should be lopped off from the system, which is as likely to be an impediment, as a facility, in the establishment of equity between men. We also think it will be the concurrent testimony of leading practitioners, that this limitless variety of declarations in actions of tort, on contracts under seal, and not under seal, on judgments, in trespass on the case, etc., etc., have very often occasioned great delays, and great injustice. If the distinction is not necessary, therefore, it ought to be abolished.

We affirm it to be *unnecessary;* and shall propose a substitute, the merits of which have been established after the trial, and by the experience of centuries. We shall go more into detail than we should, were not the knowledge

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[1] Rev. Stat. ch. 62, § 6.

[2] Rev. Stat. ch. 2, § 6, ch. 7, § 33, ch. 23, § 38, ch. 44, § 1, ch. 140, § 2.

of the proposed practice mainly limited to the cities of the seaboard.

There are two modes, substantially distinct, in which matters of litigation have been for many centuries, and still are brought before the adjudicating tribunals. One is known as belonging to the civil law, the other to the common law of England. The type of the one is the libel in admiralty, with its cognate bill in equity, divers petitions known to the ecclesiastical courts, and several creatures of our state statutes: and the other is the formal declaration which in this commonwealth is inserted in the writ. The first originated and was perfected among a people widely engaged in commercial pursuits, and enjoying a large share of political liberty. The other arose among a people chiefly trained to agricultural avocations, who were almost the fixtures of the soil, rather subjects than citizens, more retainers than framers of government. The first was developed to a great degree under republican auspices; while the other was the offspring of monarchical principles and feudal habits. Neither was primarily arbitrary, but was the natural development from the circumstances of the times. Each mode took its tone and characteristics, its genius and its forms, from the customs and necessities of the people among whom it arose. The legal demands of commerce, however, have varied in a far less degree from the earliest times, than those of agriculture. The requirements of men who have done business upon seas and between cities have remained substantially the same in all ages. The faithful and prompt fulfilment of contracts, the quick and accurate payment of debts, the easy transfer of merchandise and chattels from hand to hand, and frequent change of investments, — have ever been the leading objects of a trading and mercantile people. On the other hand, certainty of title, permanence of abode and of property, long preservation of estates in one line of familiar descent, evasion of sales, and the longest postponement of the compulsory payment of debts, have been the chief purposes of an agricultural population.

Under the civil law certain simple rules and modes were established for the attainment of its purposes, and it required no extraordinary sagacity to interpret or enforce them. Under the other system, various and complicated regulations were stringently imposed, which embarrassed and procrastinated the

accomplishment of the just purposes of the suitor, until justice, long delayed, and burdened with a weight of expenditure, at last gave a worthless boon to her client. This fault of the system has been invariably reflected upon the innocent practitioner under its tyranny. The spirit of improvement, omnipresent elsewhere, was here discountenanced; and all the liberal propositions urged by civilians were inconsiderately rejected. The animosity at one time between the liberal, and the so-called conservative spirits, became virulent; and a law-war was long and obstinately carried on, in the course of which the common lawyer audaciously extended his sovereignty over the proper jurisdiction of the admiralty. The Peter Hermit of this contest, as distinguished for his illiberality as for his ability; "a man of strong, though narrow intellect," as Hallam describes him;[1] feeding his hatred of the civil law with his personal jealousy toward a civilian;[2] with an uncontrollable pride of opinion, steeled against conviction; with an adamantine obstinacy of will, redeemed only by the accidental application of it to a good cause; the concentrated essence and the representative character of the harsh and crabbed spirit of English illiberality, dogmatism, and exclusiveness; who will go down to posterity as the architect of a Chinese wall around the lingering paganism of the common law, exposed to the dangerous inroads of a Christian civilization; — Sir Edward Coke found it in his way to expend his bitterness and perversity in a crusade against institutions whose equitable merits he was incapable of appreciating.[3] It has been well said by that learned and liberal lawyer, who so long presided over the first circuit of the United States, that this opposition to the civil jurisdiction was "more the offspring of narrow prejudice, illiberal jealousy, and imperfect knowledge of the subject, than of any clear and well-considered principles."[4] It was the result of that same iniquity and narrowness of conception, which for money could violate the sacred relation of guardian and ward, and which authorized the sale of a ward of either sex in marriage for the profit of the lord;[5]

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[1] Const. Hist. I. 455.
[2] Sir Thomas Crompton. See Lodge, III. 364.
[3] See the 4th Inst. ch. 22, *ap. cat.*
[4] 1 Sum. 553.
[5] Lord Lyt. Hist. Hen. II. Vol. II. p. 96.

which allowed an infant of fourteen years to devise a hundred thousand dollars in bank or government stock, but presumed him mentally incompetent for years afterward to devise his coffin's length of the soil;[1] and which could settle an ethical question of right by a resort to physical strength, in the trial by *battel*. Under the same narrow genius of the law, fortified by successive generations, decision was made against the liberty of the subject to emigrate and expatriate himself in however good faith, pursuing the personal liberty of the citizen with their laws of the realty the world over,[2] and claiming a power which none but a Deity can justly demand or possibly exercise. Appended to this was the odious "right of search," which has already caused one war and bled two nations. We give these illustrations in order to direct attention to the radical distinction between the legal elements of the ages from which the genius of our practice has descended to us, and those which belong to our countrymen and the present age.

In all questions of international right, and of the rules of property, the civil system appears in admirable contrast to that of the common law. Its whole aim was to facilitate the transaction of business, and to inculcate an honest regard for the obligations of debts. With respect to its bearing upon personal liberty, its odious features vanished far earlier after the entrance of Christianity, than did similar anomalies under the English law. The principle of voluntary transpatriation was declared to be the firmest foundation of popular liberty in Rome.[3] We believe, that the whole legislative, if not the judicial, sentiment of this country tends towards the adoption of the Roman view of that subject. Without waiting, as in England, till the eighteenth century for a judicial decision of the point, so early as the tabular epoch, it is declared in the sixth table, that in all disputes about slavery and liberty, the presumption shall be in favor of liberty. No arbitrary distinction is found between the inheritances of sons and daughters, but by the fifth table they share equally. This was at a period the earliest in their juridical history. Subsequently, the most important improvements were made, and it is of this subsequent civil system of

[1] 1 Pick. 239.
[2] McDonald's case, Foster's Crown Law, p. 60.
[3] Cic. Orat. pro Bal. 13.

which we write, and more with reference to the practice than to the principles of that system. While special pleading was abolished in Massachusetts but a few years since, the Emperor Constantine abolished a like practice by special decree,[1] after it had been tartly rebuked by Cicero,[2] as ensnaring and deceptive.

From the influences of our descent, and the habits conferred on us by our now foreign ancestry, we naturally adopted their modes of business, practical and judicial. They were retained almost identically so long as the great occupation of our inhabitants was the cultivation of the soil. Some of them we have retained even longer than the proper representatives of that ancestry themselves; others have been greatly modified, and many altogether abolished. Incessantly have our statutes been rending and mending the rules of the common law. Those prevalent in the admiralty, on the contrary, have remained almost unchanged. Every modification of the first, and all the novelties introduced into it, have converged toward the rules of the civil law by an irresistible compulsion of necessity, and attraction of natural propriety. These have gradually grown in favor, and in use, and one state in the confederacy has adopted a code wholly based upon the civil institutions. The former have been enlarged and retrenched, established and abolished, supported and condemned, approved and rebuked, until the most that can be said of them is, that for many years what remain of them have been tolerated. The inevitable consequence of these repeated modifications is a hermaphrodism of practice, whose chief merit is the evidence it affords of a groping for a better system. Simplicity and uniformity are, on the other hand, found in their most perfect form in the other; and proof of it is furnished by the consent of successive ages yielded to them from an early period of the Christian era. Within the jurisdiction of those civil institutions of which we write, one type of civilization has followed another, eras of force and of science have held alternate sway over empires, popular liberty and political despotism have succeeded in turn, and religion itself has experienced the mutations of the national will. But in the midst of all, that branch of those institutions to which our discourse lies has been singularly preserved without complaint,

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[1] Cod. II. 58.

[2] Cic. de Orat. I. 55.

requiring only one material institution of the common law to be engrafted upon it, — the trial by jury, at the option of either party. Notwithstanding the conclusions to be drawn from these facts, a great portion of the bar, not encouraged to prosecute their studies into the Roman institutions, blinded by the uncouched praise copiously bestowed upon the English system by the first author put into the hands of the student, and finding in most of the elementary books a studied and disrespectful neglect of those codes which originated with a paganism as superior to the paternity of the other, as was the civilization which they disclosed, — have adopted their opinions, or rather their prejudices, by inheritance from that illiberal spirit, whose political systems we discarded three-quarters of a century ago. Yet the following conclusions are inevitable. That practitioners have been dissatisfied for centuries with our customary remedies, and have sought, by great and beneficial successive changes, many of which are recent, to approximate to less exceptionable modes. That with the civil practice as found in the admiralty courts, it has not been necessary to interfere materially for centuries, although it has prevailed in numerous countries, and, in instances, side by side with the common law, yet without impeachment of the completeness of its remedies. That, in the main, our practice has manifested an increasing resemblance to that of the civil law. And finally we conclude, that, in the absence of new inventions, the adoption of remedies in civil suits, in their leading features those of the civil law, as employed in admiralty, will be the only ultimate and satisfactory improvement to be made in our system of practice.

Let then the future commissioners sweep away all existing diversity of civil remedies. Let the commencement of every suit be a simple recital, in articulate allegations, to the court which has jurisdiction of the case, of the material facts which constitute the wrong, or which are necessary to establish the right which the suitor claims. It should conclude with a prayer for the arrest of the person, or property of the defendant, or barely that he may be summoned and required to answer to the things therein alleged against him. This may be signed and sworn to according to best knowledge and belief by the plaintiff, if accessible, otherwise by his attorney. According

to the concluding prayer, which will be drawn in accordance with existing laws regulating the attachment of persons and of property, the court will establish by rule the process which shall issue thereon as of course, addressed to the sheriff, and signed by the clerk of the court. This process will command him to arrest person or property, or to summon the defendant, as the facts will authorize under the provisions of law, and return the same at a day certain. A copy of the libel may always be procured upon call, and the answer should be inflexibly, except for cause, required at the first term. The answer will follow the address of the libel, and its separate allegations, confessing, modifying, or denying each one, or adding new and controlling facts; and conclude with a prayer for such judgment or order as the respondent deems just and desirable. Where the plaintiff swears to the truth of the libel and signs it, he should have the privilege of requiring the answer to be in like manner upon oath and signature of the defendant. In other cases the oath may be optional.

What, under our present system are the "openings," are thus deliberately and carefully reduced to writing, so that counsel and court can read them, constantly refer to them, and afterwards commit them to the jury for their examination and recollection in their own room. The voice of the client is then still heard in the midst of their private deliberations, more than the eloquence of the advocate, and calls them to the merits, and to be mindful of their responsibility.[1] Evidence to meet the issues thus formed is more easily found, and a far easier application of it made from the witnesses' stand. Testimony is adduced only to the really material and conflicting points. Another important advantage to be secured thereby is the facility afforded to the judge for deducing and applying the legal principles which must accompany the case to the jury. There would be far less occasion for those exhaled decisions, which, from the necessity of the case, are now made the constant ground for the procrastinating privilege of excepting. Still another most important benefit to be derived from the proposed

[1] The parties are often lost in their advocates. A jury in Mississippi, after listening to one of the impassioned addresses of Hon. S. S. Prentiss, retired for a moment; but hastened back, reporting to the court, "We find for Mr. Prentiss," that is, for the intellectual fighter.

change, would be the careful examination into the details of a cause, before committing the interests of a client to litigation. A case set forth in the way of recital, fact by fact, assumes more the aspect of a case stated, and more readily receives the accurate and responsible judgment of the counsellor, than when set forth artificially, and clothed in that technical language which *assumes* the material facts. The whole case of the plaintiff, and that of the defendant are thus on file in court.

With reference to the distinct allegations which make up each case, and which are not conceded by the adverse party, preparation is then made for trial. It is in this respect that the advocate will find a great practical advantage and relief from labor in a change of practice. Scores of witnesses, now required by the wicked and obstinate perverseness of parties, supported therein by the laws of practice at this moment, summoned to testify to points which might as well be conceded at first as proved at last, will become unnecessary; and one large item of expenditure, the largest item of taxable expense in litigation, will be in some instances totally abolished, and in all greatly diminished. Add to this the relief from labor and the economy of time alike of court, jury, and counsel, in the examination and cross-examination of these superfluous witnesses; with the expense to the commonwealth in all its counties so done away, and there are inducements enough to give to the proposed movement a generous examination, were this the only element of merit in it. To each material and disputed allegation the advocate will demand of his client the source of the testimony thereto, and, referring to the same in the margin of his copy, will have a perfect memorandum with which to prepare for trial. The course of examination of witnesses will naturally be limited far within its present extent, and brought to bear directly upon the exact issues formed by the libel and answer. Its necessary consequence is, further, to do away with bills of particulars, specifications of defence, many emergencies requiring amendments, and many sharp rules imposing and remitting costs for imperfect pleadings. The intellect of the lawyer is left more free to grasp the substantial merits of the cause, and investigate the high constitutional or legal questions, moral or social problems involved in the trial. A large portion of the attorney's drudging routine of duty is abolished, and the exceptions

taken by the noble mind of Burke to the influence of law practice upon the intellectual faculties are greatly removed. In the same proportion as these compulsions to narrowness and illiberality are withdrawn, so will the ability and character of the profession subject to their influence be elevated; and the imputations hitherto cast upon it for that cause become undeserved and unheard.

Both the relations, as well of the defendant as of the plaintiff, are consecutively read at the opening of the trial, that there may be a direct and intelligent application of the testimony to their respective stories. The advocates may also, previously to the introduction of their evidence, give further explanation of their several views. The testimony will then be submitted, the arguments heard, and if the case is for the jury, it goes to them under the instructions of the judge, and accompanied with the written statements of the parties. Their verdict will settle the whole question of fact, *as* fact, and not as an artistic presentation of the facts; and special issues so often required for raising law questions, which will avoid the necessity of new trials, can be found with greater facility than by the present system.

The same idea of a simple recital of the orator's wrongs, and a declaration of his right, with the corresponding answer, is becoming more than formerly the practice of courts of equity. It has always been their theory, and would have been their mode, except that here also the tyrannizing hand of the common law formality grasped and confined its intended liberality, and threw its nine-linked fetters, and other "confederated" superfluities over the flexible utility of the bill in chancery. Substantially as we now understand chancery practice, if a complainant tells an intelligent story to the judge, in an epistolary way, and makes out a just cause, entitling him equitably to the assistance of the court, all incidental forms, upon protest, are ascertained to be implied in some way, and an explicit answer must be given. It will require an exceedingly plain case at common law to induce the judge, sitting in equity, to send a suitor who has already incurred a large expenditure of money in developing the real merits of his cause, to the other side of his court for a remedy.

We cannot leave this subject without specific allusion to the existing, distinctive features of courts of admiralty, whose sys-

tem, in the main, with the addition of a jury, we so strenuously urge upon the attention of the commissioners. The expedition with which in these courts the issue is ascertained, the merits disclosed, and the decree published and executed, is subject of common praise among suitors and others learned in maritime law. A comparison of it with the practice and process at common law, is singularly unfavorable to the latter. The urbanity, the liberality, the generous regulations of the one, are in striking contrast with the too frequent despotism, narrowness, and injustice of the other. The president of the one court, possesses the dignity and accessibility which indicate the atmosphere of equity, and the sphere of debate of the lofty rights of the seas, which encompass him and his tribunal. The name of no Jeffries is inscribed upon the admiralty records. The judicial organ of the other (if it may be permitted) has too often manifested by his manners upon the bench, that irritating toil was upon him, that traps and watchers were around him, of which justice was frequently the victim, and that often he was obliged to be little else than a marksman in games of intellectual gladiatorship. In the admiralty jurisdiction, if a suitor is aggrieved and has just cause of complaint, he addresses to the court a brief epistle, usually affirmed with his oath, tells the simple story of his wrongs, and prays the court to bring the wrong-doer before him, to answer why he refuses to concede to him his rights. The court grants the prayer as of course, and designates, by rule, the mode by which the party shall be required to appear. The alleged *tort feasor* appears and denies the allegations, or confesses them with modifications, and states why he has done the things charged upon him. If not sufficiently explicit, he answers further upon interrogatories. The issue is now ascertained. The proofs are afterwards adduced upon a day appointed. The court then adjudicates according to the statements of the parties, which are always before him, and according to the sufficiency of proof on points where they differ; and assesses costs upon the one party, or the other, or on both, as the merits and conduct of the respective parties require. Final process issues, speedily returnable, and the litigation is terminated. What can be more unalloyed by accident, and unstained by fraud, less ambiguous and artificial, than this mode of obtaining relief to suitors under the law of the seas?

Such is the style of remedy resulting from the liberalizing influences of maritime and commercial life during successive generations. While the dominion of both narrow and open seas have changed from one sovereignty to another, and the jurisdiction of tidewaters has shifted like the sands on which they roll, this mode of attaining and establishing justice amongst mankind has remained as unchangeable as the sea itself. "Time writes no wrinkles on the law," alike of the ocean, and of the law which controls it.

Under certain limitations not so close as at present, the control of costs as connected with the equities between the parties should be given to the court. If, for example, (a frequent instance) the wilful misconduct of one party has caused the litigation, the court should have power to compel partial reparation by the imposition of double costs in favor of the innocent. This equitable provision does in fact exist in the patent laws of the United States. If the litigation has been caused by the culpable negligence of the prevailing party, he ought not to recover costs which have accrued by consequence of his own fault. If the contest is of that honest kind which is sometimes brought within chancery jurisdiction by bills of interpleader to settle doubtful rights, marshalling assets, &c., either party should pay his own costs, the decision being by confession of a doubtful point, and a legal adjudication for the common interest. Parties should also, upon entering certain classes of tortious actions, be required, perhaps under some condition of their ability thereto, in the discretion of the court, to furnish a stipulation to secure to the defendant the payment of his costs. In many other cases, justice would be promoted by giving mutual pledges after the analogy of the Roman law.[1] There is not a docket in the commonwealth, but is stained with cases which had a foul origin in the malicious impulse of retaliation for a hasty word, blow, or act, of an intrinsic import, wholly beneath the attention of three or four counsel, twelve jurors, a dozen or twenty witnesses, and usually, in the long run, of five dignified judges. If the plaintiff is without money (too often the case in such actions) the action is frequently nonsuited, after the defendant has been subjected to the indignity of an arrest at

[1] Inst. Lib. 4, t. xi. l. 2, t. 8.

the will of his adversary, and to the expense of a preparation for trial. If it be once understood that these actions cannot be commenced, except upon fixed liability and responsibility, whereby the payment of costs are secured to the wronged party, the effect, we apprehend, will be very like that of requiring the bond in suits of replevin. Actions will not be brought except in cases of clear right; and a check will be given to that large class of suits, — the graceless spawn of an union between a low tone of retaliation in the suitor, and a dishonorable pettifogging in his adviser, — *injuriæ technicæ absque damno*, — the majority of which are entitled to little respect, except where an honest justification of character is sought. It is in this last respect, in many instances, that the common law, with its usual delicacy of apprehension, withholds its remedy entirely, the element of pecuniary damage, or criminal charge, being absent.

But our space does not permit us to go farther at present, in enforcing this change of remedy. We have sought, at the least, to exhibit an index of this very important chapter in jurisprudence. We trust it may serve to direct general attention to the whole subject. Remedies are second only to laws, and are indeed now so blended with them, as to form, practically, a part of their substance. They, like the truth and justice their theory seeks to elicit, should be simple and perspicuous. The commonwealth is bound by every principle of ethics to throw light, instead of obscurity, upon the administration of justice. As intelligibly might the old Latin be retained in use, as many of the formulas of pleadings still in custom. The uninitiated would ignore them alike, and the initiated can use them alike to protract the fulfilment of engagements. Morally, no citizen has the right to delay the performance of his contract by means of artificial and fictitious pleas. Yet the consummation of remedies is often lost through the continuances and special exceptions, which, under the present system, are in the power of the defendant, and which would, in a high degree, be obviated by the proposed change. We also challenge a denial of the maxim, that every citizen has the RIGHT, if he chooses, to the conscience of the man who has availed himself of the absence of other witnesses to withhold a right, or inflict a wrong. The test of an oath is frightful only to the perfidious. He who objects to this test, (except from conscientious motives,) convicts himself of a

wrong, wherein, unfortunately, he can now claim the protection of the law, subject only to an occasional remedy by bill of discovery. A party making, or defending a claim, ought to be compellable to exhibit his conscience in the matter to the other party. All that would then be disclosed would be the whole truth. This he owes to his neighbor upon every principle of Christian civilization. That the prohibition now existing, of an interested party's oath upon the trial of his issue, is not established upon principle, appears from the fact, that partial provision for the object herein urged is already made, not only in courts of chancery, but also in matters at law.[1] The poor debtor purges himself by his oath,[2] though the issue is the important stake of personal liberty. Even gamblers are permitted to purge their consciences to secure what the law declares to be their rights,[3] while the innocence of a man wronged, in the usual confidence of honest business, shall go unavenged. The payment of usurious interest may be ascertained upon the like purgation of parties.[4] The seduction oath is also well known in practice. These instances of codal equity are more brilliant by their contrast with the prevailing common law standard — the heirloom of paganism. They illustrate the path of a true reform in practice, that reform which shall more and more interweave our laws with the consciences of men, availing itself of that growing influence and universality of Christianity, which it is a spurning of God's providence for us to neglect in the enforcement of justice between man and man. In the immediate home of the common law, they have anticipated us, to a degree, in this inevitable modification of existing rules.[5] The only answer to the arguments approving this measure of reform is found in the allegation of its tendency to suggest perjury. Laying aside the question whether this would be sufficient were it true, let its truth be granted for the moment, and the case left to the control of the laws punishing that crime. Yet there is not a leader on any of our circuits, who does not well understand that the party's brother, or son, or employee, or agent connected with the identical transaction

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[1] Since writing the above, we have learned, that by a recent statute in Connecticut parties themselves are now admitted as witnesses.

[2] R. S. ch. 98, § 6.

[3] R. S. ch. 50, § 13.

[4] R. S. ch. 35, § 4.

[5] 3 and 4 William IV., and Statute of August 22, 1843.

litigated, though perfectly competent, will give testimony as thoroughly infused with prejudice, and poisoned with the feeling of interest, without its legal value, as ever the party himself could be. At the same time, the witness is destitute of that full knowledge of the facts contested, which, were the party himself upon the stand, could be profoundly probed and ascertained. The legally disinterested witness avoids this probation by an affirmation of partial ignorance, or want of recollection, etc. The adverse reasoning is absurd, because it is incredible that the love of gain should be, in a majority of instances, or frequently, more powerful than all the other passions of humanity — filial and parental love, personal attachment, hatred, political and religious hostility, personal pique and prepossessions, and a host of potent sentiments and passions imbedded in the human breast. These have a power which often dwarfs and annihilates the most gnawing lust of gold. And yet among these, marital love alone is included by the law in the category of expurgated moral interests. Many years ago, Chief Justice Parker observed: "It is well worthy of attention, whether a slight pecuniary interest is greater cause for taking from the sheriff the power of serving a writ, than his standing in the relation of father, or son, or expectant heir, or devisee would be, and yet neither of these relations, prevents his serving process."[1] This was said when travelling merely upon the edges of the subject. The objection is one which the law ought not to take, if not taken by the party. Its duty is done, in this respect, in providing proper sanctions to its prohibitory enactments, and claiming a truthful and honest compliance with those positive requirements which secure to the citizen the enjoyment of his rights. The law having once said that one party owes to the other the test of his conscience, a wilful breach of that obligation becomes as justly perjury, as does now the violation of it in his answer in chancery, or in the court of the commissioner in insolvency. It is for the adverse party to make the objection, and for him alone. If he willingly trusts his pecuniary interests to the conscience of his adversary, it is not for the law to interfere, and, by the application of a general rule, prohibit the last resource of a suitor wronged. It may be fur-

[1] *Merchants Bank* v. *Cook*, 4 Pick. R. 416.

ther said, that this course would absolutely dispense with a vast amount of testimony in actions of assumpsit, which may now be wilfully required by a dishonest defendant, or his irritated counsel. Frequently do such persons put the plaintiff to proof of signature of notes, and of the items of accounts, which they know, beyond doubt, to be accurate and true. It rests only with the fickle fancy, or disturbed temper of the client or the counsel, who often procrastinate procrastination itself, by vexatiously insisting upon a reference to an auditor at the last moment.

These things we affirm to be spots and blemishes upon the loyal ermine, which the commonwealth is bound early to remove. We further affirm that there will be no satisfactory reform of *practice*, with which the people of Massachusetts will rest content, that shall stop short of a separation between the relation of the cause of action and the process; the one for the court, the other for the sheriff: or which shall fail to substitute a clear and distinct relation of the facts by each party substantially, as libel and answer, for all artificial pleadings whatever, in total abolition of the wholly superfluous distinction between courts of law and of equity: or, finally, which shall refuse to the people of an educated, enlightened, and religious commonwealth, the right of search into the consciences of men for the truth upon which their equity depends, — a right of search more important and unquestionable than that which has formerly reddened the seas with the blood of war. At this present epoch, Christianity has more entered the minds and perfected the consciences of men; civilization has become more general, and perfected the understandings of men; commerce and trade more universal, and have liberalized the relations of men: all have become more potent, and have encouraged the mutual confidences of mankind. Laws and rules conceived when the symbol of the holy cross was the universal signature of the hand; when faith was established upon tradition, and conscience was expurgated at the confessional; when land was the great source of wealth and power, and its lord was absolute over the vassals that tilled it, and labor and trade were contemptible — these must give place to those suited to a new order of society, and the new character of citizens.

Recent American Decisions.

Kentucky Court of Appeals.—April Term, at Frankfort.

Gaines v. Gaines.

If a husband having sought a divorce before a judicial tribunal, and while his suit is there pending, applies to the legislature for a divorce, for the sole purpose of defeating the legal and equitable rights of the wife to his property, the divorce granted, upon such application, cannot affect the rights of property involved in the question before the judicial tribunals.

In 1832, Thomas Gaines, being then about seventy years old, married Catharine L. Pentecost, who was about thirty years old, and who had never been married. They lived very unhappily together until 1837, when a separation took place under an arrangement by which the husband transferred to trustees for the benefit of his wife, some personal property and debts on other persons, amounting to $700 or $800. In 1842, Mrs. Gaines filed her bill in chancery against her husband praying for alimony. He filed an answer resisting her claim on various grounds. At May term, 1843, he filed a supplemental answer, in which he relied on an act of the legislature divorcing him from his wife. The act was passed March 10, 1843, and is in these words: —

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That Thomas Gaines, of Green county, be divorced from his wife, Catharine Gaines."

In January, 1844, Thomas Gaines died, and in June, 1844, a bill of revivor was filed by Mrs. Gaines against his representatives, claiming dower in his lands, and a widow's distributive share in his slaves and personalty; and also, a large sum for arrearages of alimony. These claims were resisted by the representatives of Thomas Gaines. In 1847, the cause having been previously submitted, by consent, to the decision of a member of the bar in consequence of the refusal of the judge to adjudicate in the case, a decree was rendered disallowing the bar as set up under the legislative divorce, on the ground the act was unconstitutional, and rejecting the claim for arrearages of ali-

mony, and for a distributive portion of the slaves and personalty, but decreeing to the widow dower in the lands, slaves, and personalty, together with rents for the lands and hire of the slaves. The representatives of Mr. Gaines appealed; and Mrs. Gaines assigned cross errors, insisting, (1) that she was entitled to dower in the lands sold by her husband before marriage, and conveyed by him during coverture, in pursuance of his parol contract; (2) claiming dower in the slaves given by the husband to his children during coverture; and (3) for arrearages of alimony.

The court, (by MARSHALL, C. J.,) decided all these questions against Mrs. Gaines on the authority of various cases cited in the opinion; and then proceeded to the main question in the case: — whether the legislative act of divorce barred the widow's right of dower in the estate of her late husband, as follows;

— We therefore proceed to a consideration of the question how far her rights, as they would have existed upon the death of her former husband, had there been no divorce, have been affected by the legislative act relied on to bar or destroy them. The case not having been brought on to a hearing before the death of Thomas Gaines — an omission which, as there was nothing done towards its preparation after the filing of his supplemental answer in May, 1843, may probably be ascribed to the impression produced by the divorce — the question is not directly presented as to the effect which the divorcing act should have had upon the claim of alimony, if the cause had come on to a hearing before that claim had abated by the death of the husband. But it is certain, that the act, if effectual to terminate, for all purposes, and in every respect, the relation and incidents growing out of the marriage, and the rights consequent upon it, must have operated at least so far as to have deprived the wife of all claim to future support from her husband; and, perhaps, of all claim to remuneration for past neglect and suffering; and, if it be thus effectual, we cannot but remark upon it as a singular feature in the case, and one which we must suppose to be an anomaly in a constitutional government, in which the departments of power are not only carefully distinguished and divided, but the depositaries of power in each department are prohibited from exercising, except in cases expressly authorized, any power

properly belonging to the others. Can it be consistent with this division and prohibition, that after one department, erected for the very purpose of ascertaining and enforcing existing rights according to existing laws, had obtained possession of the case and jurisdiction over the parties and their rights, by a suit regularly before it in a form and for purposes authorized by law, another department, not entrusted with the jurisdiction of deciding upon individual rights, as founded in existing laws; prohibited from exercising judicial power, except in a few instances not embracing this; prohibited from passing any law impairing contracts or their obligation; prohibited from taking private property for public use, and having no pretext of a right to take it from A. and give it to B. — may, upon the application of one of the parties, take the case from the appointed and selected forum, and by its mere *fiat* put an end not only to the contest as existing in the judicial tribunal, but to the right itself, for the enforcement of which the party alleging injury had appealed to the tribunal appointed by the constitution and the law for the ascertainment of private rights and the redress of private wrongs? If the legislature could thus draw to itself, by its own will, the jurisdiction of rights actually in litigation before the proper tribunal, and either by its own judgment upon the merits decide conclusively against the right asserted, or by its own will independently of the merits, absolutely and conclusively destroy it, the right thus to interfere with and control the regular administration of the law in the appointed tribunals, implies a power over the law and its administration, which, if it finds no obstruction to its exercise in the existence of a right under and by the law, and in the authorized appeal to the tribunals of the law for its ascertainment and enforcement, would find no greater obstacle in a decree or judgment by which it was already ascertained and attempted to be enforced. If the legislative divorce obtained during the pendency of the suit for the alimony was a termination of the right, and a bar to its further assertion in that suit, so if it had been obtained after a decree for the payment of an annual sum as alimony so long as the parties should be separated, it would have been equally a termination of the right to any future payment, and a bar to the further execution of the decree. And it seems clear to us, that if the legislature could not, by its direct action or determi-

nation upon the rights of the parties, divest the court, which had rendered a decree, of its power to enforce the right adjudged according to the laws from which it was derived, neither can it, by such action or determination, deprive the court, having lawful possession of the case and jurisdiction to ascertain and enforce the right, of its lawful power to ascertain and enforce it according to the laws by which it was created and sustained.

It is the province of the legislature (so far as individual rights are concerned) to pass laws as a rule of action and of right for the community at large, or for particular classes; or for individuals under certain circumstances, to be defined by law. It is the province of the judicial power to administer these laws by applying them to the facts in individual cases for the ascertainment of the right and the redress or repression of the wrong. It is essential to the stability and security of individual rights, that they should be determined by preëxisting laws under which they have originated, and by general laws operating upon similar rights, and not by laws made merely for their decision when they come to be contested. It is to avoid the danger of individual rights being determined, not by preëxisting laws, but by a law first promulged in the decision itself, or made for it, or by the secret law of will or discretion, that the judicial department, entrusted with the power of ascertaining and enforcing private rights, as created and sustained by law, is prohibited from exercising legislative power; and it is for the same reason that the legislative department, entrusted with the power of making, altering, and repealing laws, is prohibited from the exercise of the judicial power, which is but the power of applying the existing laws to the facts, and thence deducing and establishing the rights in contest. But it is in vain that the constitution has vested this power exclusively in the judiciary department, and said that it shall not be exercised by the legislative, if, when a party, alleging injury, by the deprivation of a right, has resorted, by the appropriate remedy, to the appropriate tribunal for redress, the party accused of wrong may, by an appeal to the legislature, obtain the passage of an act, — not to change the general laws by which all similar cases are to be governed, nor to change the organization or jurisdiction of the courts by which others, as well as himself, may be

affected, — but an act for his own exclusive benefit, to operate only between himself and his antagonist, and by extinguishing the right asserted against him, to stifle judicial inquiry, arrest the administration of the law in his case, and save him from those consequences to which the general laws would subject him, if he has committed an injury to the rights of another.

The right of dower and distribution, it is true, was not expressly in litigation in the suit. But as the husband, in answer to the claim of alimony, alleged causes for divorce, according to the existing law, and prayed for it, and as the wife answered, resisting the prayer, the question of his right to a divorce was directly in litigation, and the wife's contingent right of dower, &c., (as well as her right to alimony,) so far as it was dependent upon there being a divorce or not, was involved in the issue, and to defeat both of these rights was no doubt the object of the prayer for a divorce. But not only must the husband have failed in obtaining a divorce upon his cross-bill, on the ground of abandonment; since the separation having been at least consented to, if not compelled by him, was no abandonment, — and no other sufficient causes were alleged; — but if he had succeeded, though the right to alimony and dower might, under those names have ceased, the court which decreed the divorce would have had a discretionary power to make equitable provision for the wife out of his estate. (Stat. Law, 123.) Then the appeal to the legislature was not only from a litigation regularly commenced by the wife, in assertion of her right to alimony, but also from a litigation regularly instituted by the husband himself, in assertion of his right to a divorce, which, if successful, would defeat the pending claim to alimony, and the contingent right of dower, &c., which might otherwise become absolute, but would still have his estate subject at once to a permanent provision for the wife.

Why, then, did he appeal to the legislature? Not for the mere purpose of being relieved from the society of his wife, or of terminating her right to his society. For they had already been separated, by mutual consent, for five years, without any indication of a probable desire for a reunion, which no decree of the court could have compelled. Did he seek a legislative divorce, in order that he might be at liberty to contract again, and for the fourth time, the relation of marriage? His great

age, being then about eighty-four years old, forbids the supposition that the divorce was either sought, or would have been granted, on any such ground. But as he had already passed, by a considerable interval, the ordinary limit of human life; as he must have known that his end was approaching, and that, in all probability, his wife would survive him by many years; as he must have found reason in the progress of the suit between them, to apprehend that the agreement made upon the separation might not be effectual to extinguish or bar her rights, as against his estate, and had probably become aware of the chancellor's power over it, even if a divorce were granted; and as the terms of the agreement referred to, and the nature and extent of the provision made by it, (exceeding but little the small amount of the debts due to the wife at her marriage,) showed a determination evinced also by his giving away his property even before the separation, that his wife should have no right or share in his estate; — the fair inference is, that he abandoned the forum which he himself had selected for the trial of his right to a divorce, and appealed to the legislature for the sole purpose of taking his estate out of the grasp of the chancellor, in which he had voluntarily placed it, and of extinguishing, by a legislative divorce, the rights of his wife in his property, which would not have been extinguished, but might have been established, by a judicial divorce. And it may be fairly assumed, that he resorted to this appeal as a means of effecting this purpose; either because a legislative divorce might be obtained speedily, and before his death, or because, apprehending that he could make out no ground for a divorce, according to the existing laws, by which the judicial tribunal was bound, he sought to effect his purpose by carrying his case to that department which, having power to make the law, was not bound by preëxisting laws, but might, as he supposed, decide it according to the unpromulgated law of its will or discretion; or, in other words, might decide it by the mere declaration that he be divorced from his wife. It is indeed apparent, that the real matter in dispute, from beginning to end, in the suit for alimony, and in the suit and other proceedings for a divorce, was, whether the wife should have an interest in the husband's estate.

The question, as thus developed by an analysis of the case,

is not simply whether the legislature may, under any circumstances, constitutionally enact that A be divorced from B, but whether, when it is manifest that a party, after having sought a divorce in a judicial tribunal, and while his suit is there pending, abandons that forum, and resorts to the legislative power, for the sole purpose of affecting and defeating the legal and equitable rights of his wife in his property, the divorce granted on such application can, without disregarding the division of powers, and distinction of departments, as established by the constitution, and the security of private rights of contract and of property therein guaranteed, be considered as affecting, to any extent, the rights of property involved in the question of divorce? We are of opinion that it cannot.

An act simply enacting that A be divorced from B, though passed by the legislative department in the ordinary form of a law, falls short of the ordinary definition of *law*, and more nearly resembles a sentence, which, whether founded on a previous investigation of facts under existing laws, or on the mere will or discretion of the legislature, is in the nature of a decree of rescission or dissolution, and if effectual, executes itself by its own terms. It was said by this court, in the case of *McGuire* v. *McGuire*, (7 Dana, 184,) that "so far as the dissolution of a marriage may be for the public good, it may be the exercise of a legislative function; but so far as it may be for the benefit of one of the parties, in consequence of a breach of contract by the other, it is, undoubtedly, judicial. And when thus altogether judicial, it may be beyond the authority of the Kentucky legislature, which, under our state constitution, cannot exercise any power clearly and purely judicial." And in the subsequent case of *Barthelemy* v. *Johnson*, (3 B. Monroe, 91,) the opinion is indicated in emphatic terms, that in hearing and deciding upon evidence, that alleged causes of divorce by breaches of the marriage contract existed, and in founding thereon a legislative divorce, the legislature would be violating the constitutional inhibition against their exercise of judicial power. In the case of the *State* v. *Fry*, (4 Missouri R. 131,) the supreme court of Missouri decided, after a laborious investigation of principles and authority, that a legislative divorce was unconstitutional, on the ground, it would seem, that if founded upon the causes defined by previous laws conferring on

the courts authority to grant divorces for such causes, it was clearly the exercise of judicial power prohibited by the constitution, and that if founded on causes not thus defined, it was, if not in that case also the exercise of judicial power, a retrospective law, and as such, prohibited by the constitution of that state. It would seem, however, that if founded upon alleged breaches of the marriage contract, deemed by the legislature sufficient ground of divorce in the particular case, though not so declared by previous laws, it would still be the exercise of power in its nature judicial, since it would be a decision upon the law of the contract as applied to the facts of the case. And if there be, besides, a combination of the legislative power, the act is not the less within the principle or the letter of the prohibition, that neither of the three departments shall exercise any power properly belonging to the other; nor can the legislature, by withholding from the judiciary the means or right of exercising power properly judicial, invest itself with the right of exercising that power. It would seem too, that a legislative divorce can be regarded as an exercise of the purely legislative function only, if at all, when it is founded upon the mere will or discretion of the legislature, without reference to the breach of any existing contract or law. In such a case, however, the act, though purely legislative, would be retrospective, so far as it might operate to determine mere existing rights. And although no express prohibition against the enactment of retrospective laws is found in the constitution of Kentucky, yet it does prohibit the exercise of judicial power by the legislature, and the passage of laws impairing contracts, and the taking of private property for public use, without just compensation. This last interdict must include the taking of the property of A, and giving it to B, by legislative act; since there could be no plausible pretext for such an act, unless the idea that the public good required the transfer would afford one.

Then, so far as a legislative divorce is founded upon breaches of the marriage contract, whether they might or might not, by previous laws, be proper ground for a judicial divorce, affecting the rights of property in the delinquent party, it is the exercise of judicial power prohibited to the legislature; and if, so far as it is not founded upon such causes, it be the exercise of purely legislative power, it is subject to the restriction against the

taking private property for public use, and cannot operate to take the property of one person and give it to another without making compensation, because this too is prohibited. And it would be vain to say that the legislature cannot take the property of A and give it to B, if upon the petition of the latter, it may annul the title of A derived from B, with the effect of restoring B to his title without incumbrance. The power of prescribing by general laws what causes shall constitute sufficient ground for a divorce, and what shall be the consequences of a divorce founded on the ascertainment of these causes, is strictly within the legislative competency, and its exercise is entrusted to the legislative discretion. But the power of deciding upon the exercise of these causes in individual cases, and of pronouncing the divorce and enforcing its legal consequences, is strictly judicial. And if it be conceded, as intimated in *McGuire* v. *McGuire*, *supra*, that the marriage contract is not, as a contract, wholly removed like other private contracts, from the power of the legislature to dissolve it in any particular case by special act of divorce, and that the dissolution of a marriage, if required by the public good, may be a legislative function; still it cannot be admitted that a power thus deduced, uncertain upon principle as to its existence, and still more uncertain as to the grounds of its legitimate exercise, can override the express and highly conservative prohibitions in the constitution, intended for the protection of private rights of property. We are of opinion, therefore, that whatever power, to be exercised in view of the public good, the legislature may have to enact divorces in special cases, as it cannot, even for the public good, change the right of private property from one to another without compensation, much less can it do so by a special act of divorce, sought by one of the parties against the consent of the other, with the purpose or effect of operating upon the rights of property incident to the marriage relation, as created and sustained by the general laws applicable to that relation; and the wife having taken no advantage of any privilege afforded by the divorce, she is in no manner precluded from contesting its operation. The fact, that before the passage of the act of divorce in this particular case, the parties themselves had placed the question of divorce, and the rights involved in it, under the jurisdiction of a court, to be

decided by the existing laws, if it does not affect the case in principle, serves at least to make the conflict of powers, and the bearing of the constitution upon it, more palpable than it might otherwise be.

Under these views, and without deciding upon the effect of legislative divorces, so far as they may operate upon the personal relations, and abilities or disabilities of the parties, we conclude, that the divorce in this case is inoperative as it respects the rights of property involved, and cannot deprive the wife of her interest in the estate of her husband, as it would have existed had there been no divorce; and we only remark further, that although the repeated and unquestioned exercise of a power which operates upon the community at large, or on considerable masses, should form a strong, if not an irresistible proof of its legitimate existence; the same consideration cannot be given to the repeated exercise of a power which exhausts its force in determining the condition or rights of two individuals, without any effect upon the rights or interests of the mass of citizens. And, as from the nature of the thing, it is not to be expected that acts of such limited operation, will attract, to any great extent, the serious attention or consideration of the legislative bodies, their enactment cannot be regarded as a serious and deliberate assertion of the power involved, made upon such reflection and investigation as should give it a decisive influence.

Simpson, J., though not present at the preparation and delivery of this opinion, was in consultation on the case, and concurred in the conclusion.

Decree affirmed.

District Court of the United States for the Northern District of New York.

The United States *v.* ————

Whether congress has power to provide for the punishment of the offence of *passing* counterfeit coin, *quære.*

This was an indictment for *passing* certain pieces of counterfeit coin in the similitude of the current coin of the United

States. The prisoner having been brought into court for trial, his counsel moved the court to quash the indictment on the ground that the offence charged was not within the jurisdiction of the court. The authority upon which reliance was chiefly placed in support of the motion, was *Fox* v. *The State of Ohio*, 5 Howard's R. 410.

B. F. Hall, and *D. Andrews*, for the prisoner.
George W. Clinton, District Attorney, for the United States.

CONKLING, J., in deciding on the motion, expressed himself substantially as follows:

This question is not new in this court. The same objection was made in the case of another similar indictment at a late session of the court, and the indictment, on this ground, was transmitted, under the late act of congress, for trial, to the circuit court, for the purpose of having the question brought to the consideration of the presiding judge of that court. In the interim I have again examined the case of *Fox* v. *The State of Ohio*, and I am constrained to say that the ground, on which the decision in that case is placed, seems to me to forbid the exercise of jurisdiction in the case before the court. The question in *Fox's* case was, whether the several states have authority to provide by law for the punishment of the offence for which it is proposed to put the prisoner on trial. The question was of course supposed on all hands to depend on the sound construction of those clauses of the 8th section of the first article of the constitution of the United States, by which it is ordained that congress shall have power "To coin money, and regulate the value thereof, and of foreign coin:" and "To provide for the punishment of counterfeiting the securities and current coin of the United States." The counsel for the plaintiff in error insisted that the authority of congress, in virtue of these provisions, to provide for the punishment of the offence of uttering base coin, no less than that of making it, is vested exclusively in congress: while, in behalf of the state of Ohio it was contended that this power was not granted to congress at all, and belonged, therefore, exclusively to the states. This latter proposition, I understand the supreme court distinctly to have sanctioned and adopted. "We think it manifest," say the court,

"that the language of the constitution, by its proper signification, is limited to the facts, or to the faculty in congress of coining and of stamping the standard value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing; it leaves the coin where it was,—affects its intrinsic value in nowise whatsoever." It is true that in noticing the argument of the counsel for the plaintiff in error, that unless the power to inflict punishment for the offence in question is held to belong exclusively to the national government, there will be danger that the offender will be twice punished for the same act, the court proceed to combat the reality of this danger, even conceding the power to be rightfully concurrent. But this concession is made only for the sake of argument, and its supposed immateriality does not appear to have been considered essential to the decision.

Mr. Justice McLean dissented from the decision. He agreed with the court, however, in considering the power in question to be exclusive, but maintained, in opposition to the court, that it was vested, not in the states, but in congress. His argument to show that the power, if it exists, ought to be deemed exclusive, on the ground that its exercise would, in the language of the Federalist, be "contradictory and repugnant," is very strong. Mr. Justice McLean did not, however, attempt to maintain that the power was expressly conferred by the constitution. Indeed, it would seem to be idle to insist that the grant of power to provide for the punishment of "*counterfeiting* the current coin," conferred, *ex vi termini*, the power to provide for the punishment of *passing* counterfeit coin. The offences are widely dissimilar in their nature and in point of aggravation, and have always been so considered. Had the constitution been altogether silent, with respect to the power of penal legislation, in regard to this, as well as other subjects to which it pertains and has been exercised, it would then have been left in this as in the other cases, to reasonable intendment, as incidental to the general power of legislation, or, in other words, it might have been considered as depending on that provision of the constitution which confers the power to pass all laws necessary and proper for carrying into execution the other

enumerated powers. No one, it is presumed, would, in that case, have questioned the authority of the nation to punish the crime of coining, and by parity of reasoning, the power to punish the offence of passing counterfeit coin might not unreasonably have also been inferred. At any rate, the power in each instance would have rested upon the same general footing, and the whole subject being thus committed reasonably to the discretion of congress, the constitutionality of a law providing for the punishment of passing false coin, would not have been likely to be even entertained by the courts as a judicial question. I cannot, however, but think, that the force of the learned and able opinion of Mr. Justice McLean, to prove that the power to punish the offence of passing, as well as that of counterfeiting, ought to belong to the nation, is, in no slight degree, diminished by the above-mentioned provision of the constitution, expressly conferring the power to punish the crime of coining. *Expressum facit cessare tacitum.* With the exception of "piracies and felonies committed on the high seas, and offences against the laws of nations," which are *sui generis*, and which there were the most cogent reasons for bringing under the cognizance of the national tribunals, and with the exception also of the power of penal legislation embraced in the grant of exclusive legislative authority over ceded territory, the offence of counterfeiting is the only one expressly named in the constitution, over which the legislative power of congress is declared by the constitution to extend. The authority to punish depredations upon the mail; frauds in obtaining pensions; enticing soldiers to desert; conspiracies to defraud underwriters and bottomry-bond holders; perjury, &c. &c.; is left to be inferred from the general grant of legislative power over the several subjects to which these offences respectively relate. Why was the power to punish the offence of coining expressly given, unless it was, by defining, also to *limit* the power of penal legislation relative to the coin?

On the other hand, however, it must be conceded, that serious embarrassments are likely to arise from the recognition of a concurrent power over the subject by the states. If the power to punish coining belongs exclusively to the nation, and that of punishing the offence of passing to the states, where is the power to punish the mischievous and common offence of

importing spurious coin from Canada, vested? Perhaps the subject may hereafter, upon maturer consideration, be placed by the supreme court, on a more satisfactory footing — either by deciding the power to punish all offences against the coin, to be concurrent in the nation and the states; or, which would still more effectually remove the difficulty, by reconsidering the decision of *Fox* v. *The State of Ohio*, and adopting the doctrine maintained by Mr. Justice McLean. But so long as that decision remains unshaken by the authority from which it emanated, I must decline to exercise jurisdiction of the offence of passing counterfeit coin.

Recent English Decisions.

Court of Chancery.

M'Intosh v. *Great Western Railway Company*, February 9, 1849. — *Equity Pleading — Construction — Production of Documents.* The respondents stated in their answer, "that, save as herein, and in and by the documents, papers, &c., which are mentioned in the schedule hereto annexed, and which defendants are willing to produce, &c., they are unable, &c." And in a subsequent part of their answer they claimed privilege as to some of the correspondence in the schedule: *Held*, that the defendants were bound to produce all the documents mentioned in the schedule.

If a defendant sets forth part of a privileged document in his answer, and then refers to it, he cannot protect himself from producing it.

In this case the Lord Chancellor commented upon the case of *Hardman* v. *Ellames*, (2 My. & K. 745,) as follows: "I understand that case is not reported, as it took place at the rolls before me; but I have a fresh recollection of the case, and have had frequent occasions to refer to it. According to my recollection, I proceeded on this ground. I said, if a party refers to a document, and sets out part of the document, and then refers to it, he cannot afterwards tell the plaintiff that he shall not see the document; because you are not bound to take the defendant's representation of the document. If he uses it for any purpose, he must enable the plaintiff to see that he uses it for a proper purpose, or whether it is not more beneficial to the plaintiff than the defendant thinks proper to admit. 13 Jur. 180.

Allfrey v. *Allfrey*, Feb. 21, 1849. *Opening Accounts.* A settled account may be opened on the ground of fraud, although twenty-four years have elapsed since the settlement, and fourteen since the death of the accounting party on the score of fraud. A plaintiff, by reading part of an answer of a defendant on the original hearing, does not make it evidence on the appeal.

Rolls Court.

Knight v. *Majoribanks*, November 10, 1849. A man who is in distress may, nevertheless, contract; and if, being in distress, he procures other persons to consent to an agreement, which he would not himself have requested or consented to if he had not been in distress, and afterwards successfully urges and obtains the performance of that agreement, and receives the money secured by it, and after that acquiesces for a length of time in the performance, without any notice of dissatisfaction or complaint, he is not entitled to set aside the transaction, on the mere ground of his poverty and distress, in the absence of any deception or fraud proved to have been practised upon him.

Although the correct and accurate value of one partner's share in a joint concern cannot be ascertained, without converting the property of the concern into money, ascertaining the surplus, if any, after satisfying all demands of other persons, and after taking the account betweeen the concern of each partner, and finding the balance due to or from each partner severally; yet it is lawful for partners to deal with each other in quite a different way. If they think proper, they may lawfully rely upon the stock takings, valuations and accounts which appear by the books, and the accounts kept in the manner known to, or acquiesced in by the partners; and the subsequent discovery of unintentional inaccuracy will not be ground to set such a transaction aside. And where the partnership business was carried on in Van Diemen's Land, and none of the partners could have personal knowledge of the partnership transactions, but they were obliged to rely on the reports of agents, it was *held*, that they might fairly deal with each other with respect to their shares in the concern, notwithstanding their ignorance as to their exact value. The question of value in such cases is comparatively immaterial, if there was no deception, misrepresentation, fraud, or unfair concealment. 13 Jur. 137.

Smith v. *Oliver*, January 18, 1849. *Construction of Will — Substitution — Charity — Void Bequest.* A testator gave pecuniary legacies to several persons, and he directed that the legacies should be paid within six months after his decease; and in case any or either of the legatees should die, not having received their respective legacies, and leaving any child or children, he directed such child or children to be entitled to their parents' share, in equal proportions. Some of the legatees died in the testator's lifetime, leaving children: *Held*, that such children did not take their parent's legacy.

The testator also gave £2000 (in stock) to certain church-wardens and overseers upon trust to apply £800 in erecting almshouses; and he directed the dividends upon the residue, after the houses should have become fit for habitation, to be applied for the maintenance of poor persons residing therein: *Held*, that, as the trust for the erection of almshouses was void, the trust as to the residue of the £2000 was also void, and the whole legacy fell into the residue, as undisposed of. 13 Jur. 159.

Watts v. *Christie*, March 14, 1849. *Equitable Set-off — Assignment of chose in action.* T. W. & W. W. were indebted to C. & Co., bankers, on their partnership account, but there was a balance due to T. W. from

the bankers on his private account; and, in this state of things, on the 22d April, 1843, the bankers stopped payment, but the bank continued open for business: the bankers receiving their own notes in payment of debts due to them, but making no cash payments; the stoppage being represented by them to be temporary. On May 25, 1843, T. W. assigned the balance due to him to T. W. & W. W., as partners, and notice was on the same day given to the bankers to transfer such balance to the account of T. W. & W. W. This was not done, and on May 31, 1843, a fiat of bankruptcy issued against the bankers on an act of bankruptcy committed the day before: *Held*, that T. W. & W. W. had no right in equity, to set off the balance due from T. W. & W. W. 13 Jur. 244.

Salmon v. *Greene*, April 4, 1849. *Construction of Will.* A testator bequeathed his residuary personal estate to trustees, "to pay one-third of the income to his son for life, another third to his daughter R. for life, and the remaining third to his daughter N. and his grand-daughter E. equally, for their lives; and from and after the decease of his said children and grandchild, or either of them, he directed the trustees to transfer the share or shares of him, her, or them, so dying, of and in the principal stocks, unto, between, and among all and every the child and children of his said son and daughters and grandchild respectively, so dying, lawfully begotten, share and share alike, if more than one, and if but one child, to such only child:" *Held*, that each of the children of the son living at the testator's death took vested interests immediately on the testator's death, and that the interests of such as died in the lifetime of the tenant for life passed to their personal representatives, and not to the child who survived the tenant for life. 13 Jur. 272.

Vice-Chancellor of England's Court.

Halford v. *Stains*, January 20. *Thellusson Act — Accumulations — Portions.* A testator devised his real estate to trustees, upon trust, during the life of his niece, to keep the premises in repair, &c. and (in an event which did not happen) to pay an annuity to the niece for life, to accumulate the surplus, and invest in the purchase of other real estate, to be settled to the same uses, or to invest the accumulations in the funds; upon the death of the niece, the estates (original and accumulated) to go to her first and other sons in tail male, with remainders over. His personal estate was bequeathed to other trustees, with like directions to accumulate, in the way of compound interest, during the life of the niece; then to go to her children, share and share alike, with gifts over in default of children. The heir at law of the testator died shortly after him, intestate, (as to real estate,) leaving the testator's niece (already referred to,) his heiress-at-law. Twenty-one years having expired since the testator's death, *held*, (1) that the niece was entitled to be let into possession of the devised real estates; (2) that the heiress-at-law, and not the executor of the testator's heir-at-law, was entitled, for her life, to the income arising from the accumulations of the rents and profits of the real estates; (3) that by the use of the words "*Portion*," "*Portion or share*," in the *advancement clause*, in reference to the power given to trustees to advance any of the children who should have a vested interest in the accumulations, this

case was not brought within the exception of the Thellusson Act, § 2. 13 Jur. 73.

Skarff v. *Soulby*, Nov. 6, 1848. *Voluntary Settlement — Immoral consideration.* A married man, being indebted at the time, assigned two policies on his life, on trusts for the benefit of a woman with whom he had cohabited, and her children. *Held*, that the sums payable on the policies were assets for the payment of his debts. See *Richardson* v. *Smallwood*, (Jac. 557.) Whether a provision for a woman who has lived with a married man, will be countenanced by a court of equity as a *præmium pudicitiæ*, *quære?* See *Priest* v. *Parrott*, (2 Ves. 160) 13 Jur. 90. [This case of *Skarff* v. *Soulby* is criticised by a writer in 13 Jur. 69, who maintains that the true question in this and similar cases in which voluntary settlements have been declared void as against creditors, is that of the *extent* of indebtedness at the time of the voluntary settlement. — Ed. M. L. R.]

Chipchase v. *Simpson*, January 19, 1849. *Bequest — Separate use.* A testator bequeathed to his sister, T. C., a married woman, £1000 for her or for her children's separate use, benefit, and behoof, forever; and desired his executors to pay the same to her as soon as practicable. By a codicil, stating his desire to make *further* bequests in relation to his sister, T. C., *and her family*, he desired his executors to invest a sum of £1000 upon certain trusts, for the benefit of T. C. and her children. T. C. survived the testator: *Held*, upon a bill filed by T. C. and her husband against their children and the executors of the will, that T. C. was absolutely entitled to the £1000 legacy given by the will; and that it was not given to her separate use. 13 Jur. 91.

Bodington v. *Great Western Railway Company*, Feb. 15. *Specific Performance — Time.* A railway company contracted to purchase lands, agreeing to pay interest on the purchase-money from the day they should commence their works on the lands till the purchase-money should be paid. The company did not enter into possession, or commence works for two years. A bill for immediate specific performance was dismissed. 13 Jur. 144.

Sharp v. *Arbuthnot*, Feb. 15, 1849. *Injunction — Bill of Exchange — Notice — Time to Answer.* S. directed A. & Co., the Bombay branch of a Liverpool firm, to send him cotton, and draw a bill on him for the amount. The bill was drawn and accepted by S. When the cotton arrived, S. refused to receive it, as having been improperly sent, and negotiations took place between S. and A. & Co. The bill had been sent to the Liverpool firm, who sent it to the London bankers, and advice was sent to the London bankers to sue on it if not promptly paid. The London bankers, by their answer, denied all knowledge of the circumstances under which the bill was accepted, and of the negotiations. Under the circumstances, an action brought by the London bankers was restrained.

In a similar case, the Liverpool firm had drawn bills for the amount of the cotton, which had been accepted by S. The bills were handed over to the cotton-brokers of A. & Co., A. & Co. expressing doubt whether the bills would be paid. The brokers, however, took them, and gave A. &

Co. their acceptance for a somewhat larger amount than the amount of the bills. The brokers, by their answer, denied all knowledge of the circumstances under which the bills were given, and, except generally, of the disputes between S. and A. & Co. Under the circumstances, an action on the bills by the brokers was restrained.

The Liverpool firm applied for time to put in their answer, till they could hear from Bombay, stating, that they themselves knew nothing of the circumstances. The application was refused. 13 Jur. 160.

[This decision was affirmed by the Lord Chancellor. 13 Jurist, 219.]

Thornton v. *Knight*, Feb. 16, 1849. *Delivery of Instrument.* A ship, which was insured, having been lost, the underwriter of a policy of insurance brought a bill in equity to restrain an action by the insured for the amount of the policy, and to have the policy delivered up for cancellation, on the ground of deviation and delay in the voyage, as well as unseaworthiness of the ship. A verdict was given for the defendant in the action, (plaintiff at law,) on the ground of deviation. He then brought the suit to a hearing, insisting that the policy should be delivered up: *Held*, that the whole case turning upon a mere question of fact, and there being no fraud, there was no equity, and the bill was dismissed. 13 Jur. 180.

Surtees v. *Hopkinson*, Feb. 22, 1849. *Construction of Will.* A testator gave the residue of his moneys, railroad shares, and personal estate, to trustees, in trust to invest; and, after the death of his wife and failure of issue, he gave to trustees "his residuary personal estate and effects, in trust, to invest and stand possessed of the investment," as well as "the stocks, funds, and securities" which composed his personal estate, upon trusts over: — *Held*, that the railroad shares passed by the bequest over. 13 Jur. 181.

Peile v. *Stoddart*, March 14, 1849. *Production of Documents.* The defendant to a bill of discovery, in aid of the defence to an action brought by him against the plaintiff, by his answer admitted the possession of documents, some of which, he said, contained the evidence on which he was advised, and intended mainly to rely at the trial of the action, and did not *as he was advised and verily believed*, contain any evidence in support of the plaintiff's pleas in the action, nor were in any matter material to the plaintiff's case. Others of the admitted documents, the answer stated, were private and confidential communications between the defendant and his legal advisers, in the ordinary course of professional business, and all of them related to the matters in dispute between the defendant and plaintiff in the action. The court ordered the production of the first of the above-mentioned classes of documents, but held the second privileged. 13 Jur. 225.

Watts v. *Symes*, Feb. 24, 1849. *Mortgagee — Payment — Interested Witness.* First and second mortgagees of an equitable estate; mortgagor agrees to sell to a purchaser; purchaser, at mortgagor's request, pays off first mortgagee, who refuses to assign her debt to him. On a suit for foreclosure by the second mortgagee — *Held*, that the debt was extinguished. In the same case, the mortgagor became bankrupt. Objection to his evidence in favor of purchaser, on the ground of interest, overruled. 13 Jur. 245.

Notices of New Books.

A Digest of the Law of Real Property. By William Cruise, Esq., Barrister at Law. Revised and considerably enlarged by Henry Hopley White, Esq., Barrister at Law, of the Middle Temple. Further revised and abridged, with additions and notes for the use of American Students, by Simon Greenleaf, LL. D., Emeritus Professor of Law in Harvard University. In Seven Volumes. Volume I. Boston: Charles C. Little and James Brown. London: Stevens & Norton, 194 Fleet Street. MDCCCXLIX.

When Professor Greenleaf withdrew from the Law School nearly a year ago, great regret was manifested by the profession, to all of whom he was known by his published works, and by no small part of whom he was remembered with feelings of interest and affection originating in an acquaintance at Cambridge. It will gratify these friends to hear from [illegible] once more; and we can safely say that the American edition of Cruise (of which we now chronicle the appearance of the first volume) will justify the high opinion always entertained of the learning, talents, and industry of the editor.

Mr. Greenleaf's labors have been devoted to annotations and corrections of the text. This latter duty has been successfully performed. The editor has endeavored "to abridge those cases which were transcribed at large from books easily accessible to every American lawyer, retaining the full reports of those cases only which cannot conveniently elsewhere be found. The titles, chapters, and cases which are believed to be of no use to the profession in this country have been wholly omitted. Most of the English statutes, enacted prior to the revolution, have been retained as they stood in the text; including all those which were passed before the settlement of the American colonies and are supposed to have been brought over and adopted by the colonists as parts of the English law. The later statutes, contained in the body of the work, have been transferred, generally in an abbreviated form, to the notes; but the editor has not deemed it expedient to take notice of any other changes made by recent statutes in England." The profession will see that the work which Mr. Greenleaf has thus assigned to himself, and which he has most faithfully performed, although somewhat novel, is nevertheless highly useful. A practice has grown up of reprinting English works, after they have been smothered by the contributions of successive English annotations, without any further attempt to Americanize them, than the addition of some citations from Cis-Atlantic statutes and reports. Thus the profession are taxed for far more chaff than wheat; students are puzzled to distinguish between what is and what is not valuable; and lawyers generally are lost in the conflict between English and American law. In addition to the peculiar difficulties arising from the presence of what is valuable only to Englishmen in works thus reprinted, we must be permitted to say that many of

the best English text-writers have an extremely loose and clumsy way of stringing together abstracts of cases in works which pretend to be treatises, and which should contain compact expositions of established principles with references to the source from which they are obtained. In Mr. Cruise's work which pretends only to the rank of a digest, this is perhaps excusable, but in such a treatise, for instance, as Abbott on Shipping, such looseness is unpardonable. We are sure that Mr. Greenleaf could have performed no task which would be more generally acceptable, than this very one of winnowing the chaff from the wheat. It has been performed in a manner which will do justice to his eminent reputation.

The annotations of the American editor are like his treatise on evidence, compact and accurate. They consist chiefly of citations from statutes and reports; and, we have no doubt, are as complete as it was possible to make them. The editor complains of great difficulty which he has experienced in obtaining access to the local statutes of the several states. It is most unfortunate that this difficulty should be so serious. With but little trouble and expense, the system of exchanges suggested and introduced by M. Vattemare, would secure to the profession in each state library a perfect collection of these hitherto inaccessible volumes.

We hope to recur to Professor Greenleaf's edition of Cruise. No work which has appeared for a long time will be more valuable to students or to the profession generally.

A Treatise on the Law of Carriers of Goods and Passengers, by Land and by Water. By Joseph K. Angell. Boston: Charles C. Little and James Brown. London: Stevens & Norton, 194 Fleet Street. MDCCCXLIX.

The law of Carriers, especially in this country, has acquired a peculiar importance. The extent of the American confederacy, the perfect system of free trade which is kept up within its limits, and the increased facilities of travelling and transportation contribute to this result. Under these circumstances, it is remarkable that we have not had, hitherto, any works devoted exclusively to this subject, except two English treatises — one by Jeremy, published in 1815, — and one by Jones (George Frederic) published in 1827. The only other sources to which we can recur for an exposition of this branch of the law are the leading case of *Coggs* v. *Bernard*, (2 Lord Raymond, 909) by which Lord Chief Justice Holt incorporated the whole of the civil law on the subject of bailments into the common law of England, and the two treatises, English and American, on the law of bailments, the first by Sir William Jones, the latter by the late Mr. Justice Story. In Lord Holt's decision, however, and in each of the treatises we have named, the law of carriers is considered in its place, only as a part of the comprehensive law of bailments. Besides, so great have been the changes in the modes of travelling, within the past few years that even the recent work of Mr. Justice Story may require some modification.

Under these circumstances, we should have been happy to announce the appearance of any new work on this subject, but it is gratifying to add that the desideratum has been well supplied. Mr. Angell's work has

great merit. It is systematic, compact, and the different propositions of law are accurately and clearly expressed. It treats of carriers without hire, carriers for hire not common carriers, and common carriers. Under the latter head, special attention is given to the consideration of the qualification of the liability of common carriers, created by statute or by special contract. Mr. Angell seems to think that a common carrier may under some circumstances, limit his liability, and that such a doctrine is to be deduced from *Gould* v. *Hill*, (2 Hill, N. S. R. 623,) which Mr. Angell cites. Mr. Angell also cites *Cole* v. *Goodwin* et al. (19 Wend. 251); *Hollister* v. *Nowlen*, (Ib. 234) and *New Jersey Steam Navigation Company* v. *Merchants' Bank* (6 How. S. C. R. 344.) In the three latter cases the court seemed upon the whole unwilling to deny that the extraordinary responsibility of carriers might be taken away by special agreement, provided that agreement were fairly made and well understood by both parties. Yet so jealous have the courts invariably proved themselves of any attempts on the part of common carriers to evade their liability, that they will not presume such a notice under any circumstances, but will require it to be proved by the most irrefragable testimony. The two cases cited from 19 Wendell are well known. There are cases where placards had been posted up, to notify the public that *all baggage was at the risk of the owner*. As before stated, the court came to the conclusion that though there might be a special contract for a restricted liability, such a contract could not be inferred from a general notice brought home to the employer. No exception seems ever to have been taken to these decisions. But the other leading case cited by Mr. Angell, is the well known case of the Lexington, steamer, in which it was decided that the owners of the steamer were liable to the plaintiffs for the loss of merchandise entrusted to the charge of Mr. Harnden, an express man, and himself a common carrier. Whether or not the proprietors of the steamer sustained the relation of common carriers to Mr. Harnden should seem immaterial in discussing the rights of third parties against them; for it seems reasonable to decide that there was no privity of contract between the parties to the action. The bank might have sued Mr. Harnden or Mr. Harnden might have sued the proprietors of the steamer, but does it follow that therefore there is a direct liability to the bank on the part of the proprietors. One would suppose not. Yet such is clearly the opinion of the supreme court as set forth in the majority opinion of Mr. Justice Nelson. Great reliance is placed by them upon such cases as *Higgins* v. *Senior*, (8 M. & W. 834); *Taintor* v. *Prendergast*, (3 Hill, N. Y. R. 72.) But these are cases where the question was, whether the carrier was liable directly in an action by the principal, the contract having been made by an agent, who did not disclose the name of the principal. It was held that there was such a liability. But it should be remembered that the relation between the Merchants' Bank and Mr. Harnden was not that of principal and agent, but that of bailor and bailee. Now, there are some English cases which establish the right of the bailor, under such circumstances to anticipate the process of the bailee. See *Nichols* v. *Bastard*. (2 Cr. Mees. & R. 660,) which is correctly stated by Mr. Angell, § 492, 493. This case is not cited by Mr. Justice Nelson. Still, although far more perti-

nent than those first referred to, it does not cover precisely the same ground. It was the case of a *simple* bailment, without hire, and PARKE, B. seems to have relied somewhat upon this in establishing his rule that either the bailor or bailee may sue. But Mr. Harnden's position was not that of a special bailee. He was a bailee for hire, an accredited common carrier. Applications for transporting parcels were made to him exclusively. He advertised himself as alone responsible. The New Jersey company had no control whatever over the contents of his crate. It should seem, therefore, that he alone could be held liable, *as a common carrier*, to the Merchants' Bank. The case may be considered in another aspect. Even if the extraordinary liability of a common carrier did not attach, might not the New Jersey company be held liable for gross negligence, if proved? This does not seem unreasonable. It is the view taken by Mr. Justice Catron in his dissenting opinion. We feel also at liberty to add as a fact within our own knowledge, that the late Mr. Justice Story declared it the utmost limit to which he would in any event extend the defendant's liability. A similar opinion was also expressed by the superior court of the city of New York in *Stoddard et al.* v. *Long Island Railroad Company*, referred to in 10 Law Rep. 524. As nearly as we have been able to ascertain this case, the action was brought against the Long Island Railroad company, to recover the damage sustained by four cases of silk goods, which were sent from New York to Boston by Adams & Co's express. The crate, which was used exclusively by Adams & Co., was thrown into the dock at Allyn's point (where the Norwich cars are taken) and wet by salt water. The steamboat from which the crate was thrown was under the control of the defendants. The defence was that Adams & Co. were exclusively liable. The relation of Adams & Co. to the Long Island company was identical with that of Mr. Harnden to the New Jersey company. The court held, that the owners of the steamboat were not liable as common carriers. We have seen it stated that the jury found for the plaintiffs on the ground of gross negligence. This may be so. But the court (VANDERPOEL, J.) charged the jury with great distinctness that the express-men and the steamboat proprietors were liable as common carriers. Judge Vanderpoel also stated, that the question of liability as between the express lines and the boats conveying them, had been before the full court in another case, which was eventually decided upon another point. The court however were unanimously of the opinion that the owners of the express lines, and not the owners of the steamboat or railroad, &c. on which their goods were transported, should be held liable as common carriers for the goods undertaken to be conveyed by them.

We have called attention to this point, not because we have detected in Mr. Angell's book any inaccuracy in the statement of the law as it now stands, but because the Lexington case is cited at the end of his work, together with *Hollister* v. *Nowlen*, *Cole* v. *Goodwin*, and *Coggs* v. *Bernard*, as a leading case in the law of carriers. The elevated rank of the tribunal in which it was decided, entitles the case to this prominence, yet it is doubtful whether its principle will be generally sustained by the state courts. The rights and liabilities of *express men* have become most important subjects. At one time they deranged our whole postal system;

and they have yet to be accurately defined. But the principle of the Lexington decision may be extended beyond the case of express men. By the statute of this commonwealth, (stat. 1845, ch. 191, § 2,) every railroad corporation is required on reasonable terms to draw over its own road the passengers, merchandize and cars of any other corporation. Every lawyer is familiar with the practice under this statute. For instance, the cars of the Western railroad, filled with passengers from Springfield, are attached at Worcester to the Worcester railroad trains and engines, and thus conveyed over the latter road to Boston. Suppose that while on the Worcester road the axle of one of the cars of the Western road should break, and a passenger who had purchased his ticket from Springfield to Boston should be injured in consequence. Would the Worcester corporation be held liable therefore as common carriers. They have no power to inspect these cars or to exclude them from their railroad. It would be unreasonable to subject them to such liability. Yet such would be the natural result of the doctrine of the majority of the court in the Lexington case, unless it could be proved that the passengers understood the arrangement.

We have been tempted into this desultory discussion against our first intention, which was to notice Mr. Angell's work. Upon this point we again admit that the law, as it now stands, has been correctly stated, nor was it within his province as a text-writer to criticize the decisions. His work will be valuable to every practising lawyer in the country, and ought to have a place in every library. We are happy to learn that it has been thus far well received, and we have no doubt that experience will vindicate the correctness of these first impressions.

A Practical Treatise on the Law of Replevin in the United States. With an Appendix of Forms, and a Digest of the Statutes. By P. Pemberton Morris. Philadelphia: James Kay, Jr. & Brother, 183½ Market Street, Law Booksellers and Publishers. 1849.

In the last number of the Reporter, in examining the case of the Taranto, we had occasion to lament the unfortunate and cumbrous process of replevin. Compared with the simple process in the admiralty courts, all will admit its imperfections. But so many cases remain not cognizable in the admiralty, that a thorough understanding of this peculiar process is essential to every practising lawyer. The action of replevin has been greatly modified and improved by statute in the different states of the Union. The various statutes disclose different stages of progress. Thus, the author of the work before us is seriously embarrassed in defining *replevin*. He says that in Pennsylvania, it "may be defined to be, the remedy for the unlawful detention of personal property, by which the property is delivered to the claimant upon giving security to the sheriff to make out the injustice of the detention or return the property." This definition will answer for the action as it exists in fifteen other states, but in the rest the action is much more limited. We allude to this to disclose the difficulties under which the writer of a general treatise on the Law of Replevin labors. But Mr. Morris seems to have satisfactorily performed his difficult task. The law seems to be fully and fairly set forth; and, what

is always desirable, very compactly stated. Cases are not crowded in with a morbid affectation of extreme learning, but although his citations are from the reports and statute books of every state in the Union, as well as of England, he has confined himself to such as relate to, and not merely resemble, the questions under discussion.

A slight notice is due to the publishers of this work for the elegant form in which they have given it to the public. We have rarely seen a handsomer law book.

A Treatise on the Law of Patents for Useful Inventions in the United States of America. By George Ticknor Curtis, Counsellor at Law. Boston: Charles C. Little & James Brown. 1849.

This work is thoroughly and carefully prepared, and will prove valuable to all who practise in this peculiar branch of the law. It treats, (1.) of the subject-matter of patents; (2.) of proceedings to obtain, renew, or extend a patent; (3.) of transmission of the interest in letters-patent; (4.) of infringement and the remedy therefor. Appended to the work are the laws of the United States relating to patents and the patent-office, and the decisions of Judge Cranch in cases of appeal from the commissioner of patents.

The treatise of Mr. Curtis is thoroughly American, and it is practical. It is valuable, not only to gentlemen of the law, but to the originators and proprietors of useful inventions generally. It is systematically prepared, and can be consulted with readiness by those not familiar with law books.

The Provincial Courts of New Jersey, with Sketches of the Bench and Bar. A discourse, read before the New Jersey Historical Society, by Richard S. Field. New York: Published for the Society, by Bartlett & Welford. 1849.

The above address was delivered at two meetings of the New Jersey Historical Society. It contains much interesting and valuable information, relative to the courts and lawyers of New Jersey under its provincial government.

Miscellaneous Intelligence.

Claims against Mexico. — It is thought that the following synopsis of the order recently adopted by the board of Mexican commissioners will be useful to the profession.

I. Memorials of all claims against Mexico, provided for by treaty, may be filed with the secretary of the board, (William Carey Jones,) except the claims mentioned in the 5th article of the unratified convention of November 20, 1843; namely, "all claims of citizens of the United States against the government of the Mexican Republic, which were considered by the commissioners and referred to the umpire appointed under the convention of April 11, 1839, and which were not decided by him.

II. The memorials must be addressed to the commissioners, and must set forth, (1.) In behalf of whom the claim is preferred. (2.) Whether

the claimant be a citizen of the United States, — whether he be naturalized or native; where his present domicil is; whether he claims in his own right; whether he was an American citizen, and where his domicil was, when the claim originated; if he claims in the right of another, whether such other was a citizen when the claim originated, and where was then and where is now his domicil; if, in either state, the claimant's domicil, at the time the claim originated, was in a foreign country, then whether such claimant was a subject of, or had taken an oath of allegiance to, such foreign government. (3.) Whether the entire amount of the claim does now, and did at the time of its origin, belong solely and absolutely to the claimant; and, if any other person is, or has been interested therein, then the name and extent of interest of such other person, and the nature of, and consideration for the transfer of rights and interests between the parties. (4.) Whether the claimant, or any one at any time interested in the claim, has received any thing in the nature of indemnification, for the loss or injury on which the claim is founded, and, if so, when and from whom. (5.) Whether the claim was presented to the commissioners appointed under the convention of April 11, 1839; if so, how it was then disposed of; if it was not then presented, but had its origin prior to the said April 11, 1839, then why it was not presented.

III. The board will sit on the first Monday of November, 1849, and will then decide whether memorials filed with the secretary conform to the above rules.

IV. In respect to the claims referred to in Art. 5 of the unratified convention of November 20, 1843, (see above,) *it is the opinion of the board*, that such claims may be now presented for final decision, upon the memorials, proofs, and documents submitted to the joint commissioners, and by the commissioners to the umpire, and upon such new arguments as may be filed with the secretary, in writing, addressed to the commissioners. The following rule is prescribed relative to this class of claims: — "That all persons having claims do file a memorial with the secretary of this board, addressed to the commissioners, briefly describing the claim, and the right of the claimant to receive indemnity for the injury complained of. In all cases where the original memorial addressed to the commissioners, under the convention of 1839, does not aver the claimant, and any other person under whom the claim is derived, to be, and at the time when the claim had its origin, to have been a citizen of the United States, then the said memorial shall conform to the requirements of the second of the articles of the foregoing rules relating to the subject, and shall be verified by oath or affirmation."

V. An adjourned meeting of the board will be holden on the first Monday of June, 1849, to consider claims arising under the aforesaid unratified convention. Any claimant desiring more time must file a written notice setting forth his reasons.

VI. All motions and arguments addressed to the board are to be made in writing, and filed with the secretary, who shall note thereon the time when they are received; but brief verbal explanations may be made by the claimants or their agents immediately after the opening of each day's session.

VII. The following rules and orders relating to testimony and proofs to be advanced in support of claims which may be presented for adjudication are established : —

1. All testimony must be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate, or other person authorized to take such testimony, must be certified by him, and if not known, must be certified on the same paper upon oath by some other person known to such magistrate having no interest in such claim, and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition must be reduced to writing by the person taking the same, or by some person in his presence, having no interest, and not being the agent or attorney of any person having an interest in the claim, and must be carefully read to the deponent by the magistrate before being signed by him, and this must be certified.

2. Depositions taken in any city, port, or place, without the limits of the United States, may be taken before any consul or other public civil officer of the United States resident in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest in the claim, to which the testimony so taken relates. In all other cases, whether in the United States or in any foreign place, the right of the person taking the same to administer oaths by the laws of the place must be proved.

3. Every affiant or deponent must be required to state in his deposition his age, place of birth, residence, and occupation, and where was his residence, and what was his occupation, at the time the events took place in regard to which he deposes ; and must also state if he have any, and if any, what interest in the claim to support which his testimony is taken ; and if he have any contingent interest in the same, to what extent, and upon the happening of what event he will be entitled to receive part of the sum which may be awarded by the commissioners. He must also be required to state whether he be the agent or attorney of the claimant, or of any person having an interest in the claim.

4. Original papers exhibited in proof must be verified as originals by the oath of a witness, whose credibility must be certified as required in the first of these rules, but when the fact is within the exclusive knowledge of the claimant it may be verified by his own oath or affirmation. Papers in the handwriting of any person who has deceased, or whose residence is unknown to the claimant, may be verified by proof of such handwriting, and of the death of the party, or his removal to places unknown.

5. All testimony taken in any foreign language, and all papers and documents in any foreign language which may be exhibited in proof, must be accompanied by a translation of the same into the English language.

6. When the claim arises from the seizure or loss of any ship or vessel,

or the cargo of any ship or vessel, a certified copy of the enrolment or registry of such ship or vessel must be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States, which she possessed on her last voyage from the United States when the same are in the possession of the complainant, or can be obtained by him; and when not, certified copies of the same must be produced, together with his oath or affirmation that the originals are not in his possession, and cannot be obtained by him.

7. In all cases where property of any description for the seizure or loss of which a claim has been presented, was at the time of such seizure or loss insured, the original policy of insurance, or a certified copy thereof, must be produced.

8. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, must be produced.

The following extract from article XV., of the treaty of 1848 relates to documentary evidence in the possession of the Mexican government: —

"If, in the opinion of the said board of commissioners, or of the claimants, any books, records, or documents, in the possession or power of the government of the Mexican republic, shall be deemed necessary to the just decision of any claim, the commissioners, or the claimants, through them, shall, within such period as congress may designate, make an application in writing for the same, addressed to the Mexican minister for foreign affairs, to be transmitted by the secretary of state of the United States; and the Mexican government engages, at the earliest possible moment after the receipt of such demand, to cause any of the books, records, or documents, so specified, which shall be in their possession or power, (or authenticated copies or extracts of the same,) to be transmitted to the said secretary of state, who shall immediately deliver them over to the said board of commissioners: Provided, That no such application shall be made by, or at the instance of, any claimant until the facts which it is expected to prove by such books, records, or documents shall have been stated under oath or affirmation."

By Act of Congress of March 3, 1849, the period within which application may be made to the Mexican minister of foreign affairs, is limited to one year from the organization of the board (April 23, 1849.)

The Office of Attorney-General. — Our readers may have been amused, under the circumstances, by the article under this title in the last Law Reporter. At the very end of the session, after a most remarkable vacillation, the "great and general court" resuscitated the ghost, and secured to the commonwealth the services of a most important officer.

A recent mistake of his excellency and the honorable council should seem to vindicate the necessity of appointing a new legal adviser. An election was ordered in the fourth congressional district, on the 30th ult. This was the last Wednesday of May — a day fixed by Stat 1840, ch. 92, § 23, for the annual inspection of the volunteer militia. Most unfortunately, by Rev. St. ch. 4, § 1, no meeting for the election of representatives in congress can be holden on any day on which the militia of the

commonwealth are required to do military duty. The mistake was pointed out, however, in season to have it rectified.

The creation, or the renewal, of the office of attorney-general was followed by the appointment of Hon. J. H. Clifford, of New Bedford. Mr. Clifford has been, for several years, the district-attorney for the southern district, and he brings to his new office the qualifications of long experience in the criminal courts, and of learning and sound judgment in all matters connected with his profession. It is thought to be a very fortunate appointment.

Admiralty Practice. — A gentleman of New York, of high professional reputation, writes to us in regard to our notice of the case of *The Taranto*, "I fully accord with you in your views of the subject. I am inclined to think that the hostile spirit of my Lord Coke exhibited what the whalers would call its 'dying flurry' in the case of the Lexington; which, as you may have remarked, the court quietly disposed of by references to its own antecedent decisions and language, while acting under the inspiration of Judge Story, and with scarcely an allusion to the usual long array of English authorities to prove what nobody ever denied."

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Barker, Smith A.	Boston,	April 13,	J. M. Williams.
Batcheller, Benjamin L.	Sutton,	" 13,	Henry Chapin.
Breed, Andrews,	Lynn,	" 28,	John G. King.
Burrill, John B.	New Bedford,	" 6,	David Perkins.
Chace, John P.	Freetown,	" 5,	David Perkins.
Cogswell, W. E.	Lexington,	" 5,	Asa F. Lawrence.
Corlew, Joseph E.	Millbury,	" 7,	Henry Chapin.
Dickinson, Harvey,	Boston,	" 16,	J. M. Williams.
Doten, Isaac L.	Concord,	" 23,	Asa F. Lawrence.
Frisbee, Lyman F.	Boston,	" 7,	J. M. Williams.
Hall, David,	Boston,	" 23,	J. M. Williams.
Ham, Benjamin F. et al.	Millbury,	" 10,	Henry Chapin.
Holbrook, Henry J.	Braintree,	" 17,	Francis Hilliard.
Holt, Simon,	Worcester,	" 20,	Henry Chapin.
Jewett, Nathan B.	Worcester,	" 23,	Henry Chapin.
Kingsbury, Luther F.	Sutton,	" 13,	Henry Chapin.
Lincoln, Lysander R.	Northampton,	" 13,	Myron Lawrence.
McIntosh, Nathan,	Needham,	" 23,	Francis Hilliard.
Nichols, Benjamin R.	Fall River,	" 5,	David Perkins.
Partridge, Horace F.	Cummington,	" 24,	Myron Lawrence.
Pelton, John W.	Springfield,	" 3,	George B. Morris.
Perry, William,	Boston,	" 11,	J. M. Williams.
Powers, John,	Leominster,	" 4,	Henry Chapin.
Rhoades, S. & A. H.	Boston,	" 3,	J. M. Williams.
Sanborn, Anson,	Auburn,	" 4,	Henry Chapin.
Scott, John,	Worthington,	" 21,	Myron Lawrence.
Short, Joseph,	Salem,	" 14,	John G. King.
Sisson, Robert,	Lynn,	" 11,	John G. King
Smith, Royal,	Walpole,	" 10,	Francis Hilliard.
Stetson, S. A. et al.	Boston,	" 7,	J. M. Williams.
Stone, John, 2d.	Rutland,	" 30,	Henry Chapin.
Vinal, William D.	Lowell,	" 18,	Asa F. Lawrence.
White, Homer,	Granby,	" 6,	Myron Lawrence.
Williams, Bradford,	Lynn,	" 6,	John G. King.
Wright, George H.	Brighton,	" 6,	Asa F. Lawrence.